UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
25th meeting
held on
Wednesday, 30 October 1991
at 3 p.m.
New York

SUMMARY RECORD OF THE 25th MEETING

Chairman: Mr. AFONSO (Mozambique)

CONTENTS

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued)

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, Room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/46/SR.25
6 November 1991

ORIGINAL: ENGLISH

91-56935 5081S (E)

The meeting was called to order at 3.05 p.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. GISLASON (Iceland), speaking on behalf on the Nordic countries, noted that the International Law Commission had taken into account many of the comments submitted by the Nordic countries on the draft articles on jurisdictional immunities of States and their property as adopted on first reading. In the course of 1992, the Nordic delegations would be prepared to consult on any outstanding problems. The material prepared by the Commission was sufficiently well-grounded to enable them to endorse its recommendation that a conference be convened in order to conclude a convention that would provide a pragmatic basis for the resolution of differences which might arise between States in the field of State immunity.

2. Mr. TUERK (Austria) said his delegation supported the idea of convening an international conference of plenipotentiaries to examine the draft articles on jurisdictional immunities of States and their property. The subject-matter required a great deal of expertise which could necessitate the participation of various government departments, in particular, Ministries of Justice. Furthermore, a concerted effort by representatives of Governments within a strictly limited period of time would offer much better prospects for success than an endeavour by a working group of the Committee which might have to go on intermittently for some time. In that connection, he referred to the long-standing tradition of the Austrian capital as the venue of United Nations codification conferences.

3. He suggested that the existing draft articles should be submitted to Governments for comments before 1 July 1992. At the next session of the General Assembly, a working group of the Committee could be established in order to consider those comments, and a conference could then be convened for the spring of 1993.

4. The International Law Commission had been very successful in bridging the gap between the two main schools of thought - absolute versus restricted State immunity. The draft articles provided an excellent basis for the work of a codification conference but had certain shortcomings which would need to be remedied. Provisions would also need to be drafted on the settlement of disputes. Austria would regard a codification conference as a success only if its results were acceptable to all segments of the international community.

5. With regard to article 2, paragraph 2, his delegation reiterated its preference for the exclusion of the criterion of purpose when determining whether a contract or transaction was a "commercial transaction" under paragraph 1 (c) of that article. A restriction on the nature of a transaction could avoid possible subjective interpretations which might in certain cases aim at escaping legal action. In respect of article 7, his delegation would

(Mr. Tuerk, Austria)

prefer to delete the reference to a written contract in paragraph 1 (b), since that reference gave a State the possibility of relinquishing a right under international law by way of a contract which was subject only to municipal law.

6. His delegation was very disappointed that the article on cases of nationalization had been deleted; it strongly believed that the draft articles should contain a general reservation concerning matters regarding the extraterritorial effects of measures of nationalization. Many legal systems, including that of Austria, were based on the principle of territoriality and therefore measures of confiscation, including nationalization, could not be extended to property situated outside the territory of the confiscating State.

7. As to the title of part III of the draft articles, his delegation continued to prefer the use of the term "limitations on State immunity"; however, the compromise formulation of the Commission should meet the concerns of both schools of thought on State immunity.

8. With regard to part IV of the draft articles, his delegation would prefer the formulation of article 18 adopted on first reading, since it supported the concept that allowed measures of execution against the property of other States even without their express consent. In its view, immunity from execution should not become the last bastion of State immunity. Accordingly, no further conditions should be attached to the possibility of taking measures of execution; the requirement in paragraph 1 (c) of article 18 that there be a connection with "the claim which is the object of the proceeding in or with the agency of instrumentality against which the proceeding was directed" should be dropped. The restriction contained in the first part of paragraph 1 (c) should suffice.

9. With regard to article 19 and especially paragraphs 1 (d) and (e), his delegation suggested that the expression "property" be supplemented by the term "public" to make it clear that the article related only to property belonging to the State.

10. Regarding the miscellaneous provisions and in particular article 20, his delegation noted with satisfaction that the hierarchy of the various forms of service of process had been dispensed with; with respect to translations, it continued to advocate the deletion of the phrase "if necessary" in paragraph 3, particularly as it was not clear who was to decide whether the translation of a document was necessary. His delegation believed that a document should in any case be accompanied by a translation if it was not written in the official language, or one of the official languages, of the State concerned.

11. The draft articles still lacked a provision concerning the obligation of the forum State to compensate the winning party for the costs of legal proceedings. Such a provision was a necessary corollary to the exemption of the foreign State from providing any security, bond or deposit in order to guarantee the payment of judicial costs.

(Mr. Tuerk, Austria)

12. Austria, as an upstream as well as a downstream State, situated on one of Europe's main fluvial arteries, had always been particularly interested in the law of the non-navigational uses of international watercourses. The fundamental political changes in Europe over the past two years had had a direct impact on all aspects of relations between States of that region and had led to a new awareness of the urgent need for developing a new regime governing the non-navigational uses of the Danube common to all riparian States. Austria had consistently favoured a regime on international watercourses that would allow for sufficient flexibility. The legal rules to be developed should contain a framework of principles rather than too many detailed norms, leaving it ultimately to the States concerned to conclude bilateral or multilateral agreements based on those principles and building upon them. It was not easy to strike a balance between the two conflicting concepts of shared water resources and State sovereignty. In numerous bilateral agreements concluded with neighbouring States dealing with complicated water rights issues, Austria had tried to find solutions which adequately took into account the legitimate interests of all parties concerned and had been guided by the concept that the uses of a watercourse in areas close to the border required negotiations or at least contacts with the neighbouring States concerned while non-navigational uses outside such border areas required such negotiations or contacts only if those uses significantly affected the neighbouring State. That procedure corresponded to the concept of an equitable use of international watercourses and good-neighbourly relations.

13. His delegation endorsed the definition of a "watercourse" in article 2 (b) and also agreed with the manner in which the question of groundwater had been dealt with. In connection with article 10, his delegation agreed that special regard should be given to the requirements of vital human needs. Articles 26, 27 and 28 emphasized the duty of States to cooperate; that duty was the fundamental principle which should guide the entire codification effort.

14. Mr. BOWETT (United Kingdom) stressed the importance his Government attached to the work of the International Law Commission, an importance which was unlikely to diminish in the years ahead.

15. Speaking on the subject of jurisdictional immunities of States and their property, he expressed his Government's gratitude to the Commission and its Special Rapporteur for the work done on that difficult topic. The final adoption by the Commission of the set of draft articles on the topic was no small achievement.

16. The United Kingdom's basic position on the subject, as set out by his delegation in previous years, was that in the light of contemporary State practice the old rule of absolute immunity was obsolete; persons dealing with a foreign State in a non-sovereign capacity and finding themselves in dispute with that State should be able to have the dispute settled by the ordinary processes of law. Generally speaking, the draft articles before the Committee

(Mr. Bowett, United Kingdom)

accepted that position, and his delegation therefore welcomed the Commission's approach.

17. Certain difficulties remained, however, in the implementation of that approach, and it was yet to be seen whether the approach was acceptable to Member States generally. His Government hoped to be able to give sympathetic consideration to the Commission's recommendation that a plenipotentiary conference should be convened with a view to concluding a convention on the subject. The question of that proposal's practicability depended, however, on the views of other States; there had to be a fair measure of support for the Commission's approach before a reasonable prospect of success could be assured.

18. He proposed to illustrate the difficulties in the implementation of the Commission's approach by three points. The first was the definition of a "commercial transaction". While his delegation entirely agreed with the Commission's adoption of the nature of the contract or transaction as the primary test in article 2, paragraph 2, it considered the secondary test - that of the purpose of the transaction - to be mistaken and likely to lead to great uncertainty. In the first place, the purpose of the transaction might not be clear to the private party. For example, if a State purchased computer hardware, how was the supplier to know whether the State intended to use it for organizing the logistics of its army or the bus and railway timetables of the various private enterprises which provided the country's transport system? His delegation had no quarrel with the Commission's concern to provide an adequate safeguard and protection for developing countries (A/46/10, para. (26) of the commentary to art. 2), but wondered whether it might not be more appropriate for the State to specify, in the contract or as part of the transaction, that it was acting for a sovereign rather than a commercial purpose. To indicate in the commentary that the secondary test would apply only when it was the practice of the particular State to apply it was not very helpful, evidence of State practice being, as everyone knew, often difficult to obtain.

19. The second point concerned immunity from measures of constraint (art. 18). His delegation failed to see why, in that article, the State was not treated like a private party for purposes of execution as a general rule, the special cases of article 19 apart. Its concern related particularly to article 18, subparagraph 1 (c), which allowed State property specifically in use or intended for use for other than non-commercial purposes to be attached if the property had a connection with a claim which was the object of the proceeding or with the agency or instrumentality against which the proceeding was directed. Such an approach seemed excessively restrictive, and his delegation would favour the deletion of the second part of the subparagraph.

20. The third point concerned the retention of the concept of "segregated State property" in article 10, paragraph 3. True, the term as such was not used and the original proposal - former article 11 bis - had disappeared. But the basic idea that a State's immunity was not affected by proceedings

(Mr. Bowett, United Kingdom)

relating to a commercial transaction entered into by a State enterprise or other entity with separate legal personality and capable of bringing suit and owning property in its name still remained. Implicit in that approach seemed to be the idea that, for the purposes of execution, only the property of such a State enterprise or entity but not the property of the State in general could be attached. If that was indeed the point, it should, in his view, have been stated rather more clearly; and if it was, he fully shared the concern expressed at an earlier meeting by the representative of Germany. What would prevent a State from organizing its commercial activities through such separate agencies or entities but making sure that they owned very little property which could be used to satisfy a judgement? Given that the State's own property could not be attached, the judgement creditor would be left with an unenforceable judgement. If the agency operated as a separate entity, the private party was entitled to be told in clear terms that it was not contracting with the State, and perhaps also to have some means of knowing what were the capital resources of the State entity. If, alternatively, the agency operated on behalf of the State, the immunity it enjoyed in principle was forfeited because of the commercial nature of the transaction. In that event, it was difficult to see why only the property of the agency and not that of the State could be attached. He was somewhat puzzled by the logic of article 10, paragraph 3, and would welcome clarification.

21. In conclusion, he said that he had annexed to the text of his statement as informally distributed to the members of the Committee certain detailed comments his delegation wished to make on articles 16 to 23, which had undergone substantive changes during their second reading by the Drafting Committee and their adoption by the Commission. Those comments were intended to supplement the written observations submitted by his Government in 1988 in response to the Secretary-General's request (A/CN.4/410) as well as its subsequent statements in the Sixth Committee.

22. Mr. NATHAN (Israel) said that the question of how much jurisdictional immunity States enjoyed had until recently been a controversial one in judicial practice and scholarship: some defended the doctrine of absolute immunity while others were in favour of the restrictive theory, based upon the distinction between acta jure imperii and acta jure gestionis. In other words, the rule par in parem non habet jurisdictionem would not apply when the State engaged in commercial activities. That distinction currently dominated the practice in most national courts and was embodied in such instruments as the 1972 European Convention on State Immunity, and was to become the basis of the draft articles prepared by the Commission. His delegation agreed with that basic approach, which had already been adopted some time before by an Israeli court.

23. In summary, when a State engaged in commercial transactions, it divested itself of its sovereign character in regard to those transactions and should not therefore be entitled to sovereign immunity in respect thereof. Commercial transactions of a State were in many cases performed by State-controlled enterprises having their own legal personality, and the

(Mr. Nathan, Israel)

Commission had - correctly in the view of his delegation - adopted the position, in article 10, paragraph 3, that as far as such transactions were concerned, no question of State immunity was involved, as such enterprises could not be considered the alter ego of the State.

24. Article 2 (a) provided that the term "court" meant "any organ of a State ... entitled to exercise judicial functions". The draft articles did provide for immunity from all forms of execution, but in some States offices entrusted with execution were not considered courts and most of their functions were not judicial functions; that situation should no doubt be considered in the final text.

25. Article 7, which dealt with the manner in which consent to exercise of jurisdiction was to be given by the State, should spell out the stage of the proceedings expressed at which consent by declaration or written communication should be given, and the proper authority to make such declaration or communication.

26. With regard to article 8, paragraph 4, he noted that to enter an appearance was a technical term of civil procedure; in some States, there was no provision for the entering of appearance, and the defendant became involved in the action upon filing a statement of defence.

27. Article 10, paragraph 1, one of the central provisions of the draft articles, provided that the State could not invoke immunity in a proceeding arising out of a commercial transaction; however, the words "arising out of" might be too narrow and should possibly be replaced by such words as "relating to" in order to broaden the scope of the provision.

28. In article 10, paragraph 3, the formulation "State enterprise ... established by the State" might not be sufficiently precise, as such enterprises were not necessarily established by the State. It might perhaps be specified, too, how independent legal personality was to be proved. Article 16, paragraph 7, might be of assistance in that connection.

29. With respect to article 11, paragraph 2 (c), the labour laws of the State of the forum were of territorial application irrespective of the employee's nationality, so a test of nationality or habitual residence seemed unnecessary.

30. Article 16, paragraph 6, might be superfluous: if immunity could not be invoked and the State appeared in court, the same scope of defences was available to it as to any private individual, and no enumeration was necessary. Similarly, in article 17, the enumeration of supervisory functions of the court in regard to arbitration proceedings was not exhaustive and might well be replaced by a general reference to all supervisory functions of the court of whatever nature.

31. Mr. BELLOUKI (Morocco) said that in completing its work on jurisdictional immunities of States and their property the International Law Commission had shown its ability to deal successfully with in complex topics and had managed to reconcile the sovereign interests of States in a world of growing interdependence. The rule of international law enabling a foreign State to claim immunity from the jurisdiction of the State of the forum, as contained in the draft articles, formed an acceptable basis for the codification of the relevant law in an international convention. The question of dispute settlement was particularly important if the envisaged international instrument was to be legally unassailable.

32. In article 2, his delegation considered that paragraph 1 (b) (v) should he deleted, as there was a danger of confusion between the immunity of the State and that of its representatives.

33. In article 3, paragraph 2, mention should be made of Heads of Government - who in many countries held the real power - and of Ministers for Foreign Affairs.

34. Article 5 was the key provision of the draft articles. His delegation welcomed the deletion of the reference to "the relevant rules of general international law", since it had tempered a somewhat narrow conception of the immunity of States and their property, which the draft articles had appeared to limit unduly in certain grey areas where the acts of the States were not clearly performed in the exercise of their sovereign authority.

35. The manifold involvement of States in various areas of international economic life had given rise to acta jure imperii and acta jure gestionis, but those two concepts needed to be interpreted so as not unduly to deny the State its sovereign authority or ignore the legal consequences thereof. In addition, the immunity of States and their property from execution and enforcement measures was of great importance for developing countries in particular, as much of their property was used for public purposes.

36. Mr. de SARAM (Sri Lanka) said that the draft articles on the jurisdictional immunities of States and their property formulated by the Commission were a formidable achievement and, when they eventually entered into force, would go far towards removing the uncertainties experienced by individuals and entities engaged in commerce and other transactions of a private-law nature when, although convinced of the righteousness of their claims, they came up abruptly against the walls of jurisdictional immunity.

37. In a field of law described by an earlier speaker as "often chaotic", concepts or labels such as jure imperii or jure gestionis might not always clarify and could even confuse. Hence, the test for determining whether the draft articles were or were not reasonable might well be whether they were fair and workable from the point of view of those engaged in international trade and other international transactions of a private-law nature.

(Mr. de Saram, Sri Lanka)

38. The question did, however, arise whether some further review of the draft articles would not be helpful before a conference was finally convened. Such further review would require the following steps: sending the draft articles to Governments for their observations; the collection, and evaluation of their replies; a collective review by the United Nations (or, preferably, the Commission) of the points made, and a decision on the changes necessary in the draft articles, followed by formulation of new draft articles. More generally, in view of past efforts and achievements, it might be useful to proceed to prepare a convention in two phases, first codifying what had already been achieved, and then preparing a supplementary convention to deal with any unresolved elements. It would also be helpful if an opportunity could be provided for a further review of the articles from the standpoint of language and editing and for bringing the various language versions into concordance: a convention should leave nothing to be desired from the point of view of clarity. In that connection he recalled that prior to the most recent codification conference in Vienna a working group had met in New York on several occasions to clarify organizational aspects of the conference and its rules of procedure, to very good effect. Perhaps similar arrangements might be made before a conference on jurisdictional immunities was convened; that might also provide an opportunity for undertaking the editorial refinement and linguistic concordance he had already mentioned.

39. Lastly, it would be helpful if the final clauses to be included in the proposed convention were appended in some form to the draft articles when they were transmitted to Governments. His delegation concurred with the suggestion of an earlier speaker that an article on the settlement of disputes should be included. It might also be advisable to have an appropriate and not too cumbersome additional article on a procedure for review of the convention.

40. Mr. PAL (India) said that the draft articles on jurisdictional immunities of States and their property adopted by the Commission were of great importance. While it was universally agreed that the State enjoyed immunities in respect of its governmental functions, it was equally agreed that no immunity should be enjoyed in respect of commercial transactions. There was no clear agreement, however, on what constituted a commercial contract or on the criteria to be employed in defining it. Furthermore, with increasing numbers of States engaging in commercial activities through specifically designated agencies or instrumentalities, the question arose as to the immunities to be accorded to States in cases concerning such commercial agencies or instrumentalities. Other potentially controversial issues included the question of posting suitable bonds by way of security; that of seeking certification from the Foreign Ministries of States regarding the commercial nature or otherwise of the contract involved; and that of the employment by diplomatic missions of persons recruited locally within the country of accreditation.

(Mr. Pal, India)

41. It was a noteworthy feature of the draft articles adopted by the Commission that they provided a definition of a commercial transaction and specified that, in determining whether a contract or transaction was a commercial one, reference should be made not only to its nature but also to its purpose (art. 2, para. 2). Other significant features relating to the controversial points he had mentioned were article 10, paragraph 3; article 11; and articles 18 and 19. The draft articles thus made a significant contribution by clarifying the scope and nature of State immunity in litigation concerning commercial activities. It was also to be noted that they did not provide any obligation for the State to post a bond in connection with court proceedings before a foreign court, often a matter of great concern to developing countries, and did not exclude the possibility of States providing certification, if they so chose, in accordance with their law and practice.

42. The Commission was to be commended for finalizing a set of articles based on pragmatism and progressive thinking which would undoubtedly contribute to the development of international commercial transactions, keeping in view the interests of the developing countries. His delegation would therefore be inclined to support the idea of convening a plenipotentiary conference with a view to adopting an international convention on the subject.

43. Mr. PETROV (Bulgaria) said his delegation was pleased that in the draft articles on jurisdictional immunities of States and their property, the Commission had largely sought inspiration from the provisions of the European Convention on State Immunity of 1972, and had been able to reconcile the concept of absolute immunity and that of restricted immunity of States; a synthesis of the two theories should prove to be a workable solution.

44. In the past, because of the existence of State segregated property in Bulgaria, his delegation had favoured the concept of absolute immunity of the State, asserting that a State always acted in exercise of its imperium. That concept had now been abandoned, as could be seen from the Constitution and the laws on commerce and foreign investments recently passed by the Bulgarian Parliament as a basis for the sweeping legislative reform currently taking place in Bulgaria aimed at building a free market economy. His delegation therefore accepted the distinction made in the draft articles between acts jure imperii and acts jure gestionis of a State.

45. Article 2 provided a satisfactory definition of such important concepts as "State" and "commercial transaction"; with regard to paragraph 2, his delegation would have preferred that the nature of a transaction be taken as the only criterion for its commercial character but accepted the definition worked out by the Commission.

46. Most of the general principles set out in part II of the draft were already embodied in article 8 of the Bulgarian Code of Civil Procedure. His delegation had no objections to articles 10 to 17, which largely reflected

(Mr. Petrov, Bulgaria)

current State practice. However, it would prefer to see article 16 redrafted along the lines of article 96 of the 1982 United Nations Convention on the Law of the Sea. It agreed that article 22 should be redrafted to provide for an obligation on the part of a State acting as plaintiff to provide security, bond or deposit to guarantee the payment of judicial costs or expenses. His delegation believed that the Commission should have addressed the question of the settlement of disputes. It would favour a decision to convene an international conference of plenipotentiaries but was also prepared to support a decision that further consideration of the draft articles should be entrusted to a working group within the Committee.

The meeting rose at 4.35 p.m.

UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
26th meeting
held on
Thursday, 31 October 1991
at 3 p.m.
New York

SUMMARY RECORD OF THE 26th MEETING

Chairman: Mr. AFONSO (Mozambique)

CONTENTS

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued)

AGENDA ITEM 125: MEASURES TO PREVENT INTERNATIONAL TERRORISM WHICH ENDANGERS OR TAKES INNOCENT HUMAN LIVES OR JEOPARDIZES FUNDAMENTAL FREEDOMS AND STUDY OF THE UNDERLYING CAUSES OF THOSE FORMS OF TERRORISM AND ACTS OF VIOLENCE WHICH LIE IN MISERY, FRUSTRATION, GRIEVANCE AND DESPAIR AND WHICH CAUSE SOME PEOPLE TO SACRIFICE HUMAN LIVES, INCLUDING THEIR OWN, IN AN ATTEMPT TO EFFECT RADICAL CHANGES (continued)

(a) REPORT OF THE SECRETARY-GENERAL

(b) CONVENING, UNDER THE AUSPICES OF THE UNITED NATIONS, OF AN INTERNATIONAL CONFERENCE TO DEFINE TERRORISM AND TO DIFFERENTIATE IT FROM THE STRUGGLE OF PEOPLES FOR NATIONAL LIBERATION

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, Room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

91-56989 5104S (E)

Distr. GENERAL
A/C.6/46/SR.26
8 November 1991

ORIGINAL: ENGLISH

The meeting was called to order at 3.05 p.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. CALERO RODRIGUES (Brazil) said his delegation had had some doubts about the feasibility of drafting articles on the non-navigational uses of international watercourses that would be suitable for application to international watercourses in general since they varied so much in size, location and characteristics; even so, the draft articles could be considered a reasonable basis for an international instrument. The International Law Commission had adopted the only workable approach, the framework agreement approach, thus avoiding the need to tackle the myriad of problems which arose and leaving the specific rules to be applied to specific watercourses to be set out in agreements between the States concerned, as was the current practice.

2. Referring to article 2, his delegation had no objection to defining a watercourse as a "system of waters", on the understanding that that did not mean that the articles would necessarily apply to every single part of the watercourse but would apply only if and when the use of the watercourse or of its waters in the part in question affected uses in another State. Even if hydrologically all the parts of a watercourse constituted a unitary whole, it did not necessarily follow that they came under the purview of the articles. The concept of an international watercourse continued to be, legally speaking, a relative one. Although the term "international" implied that the waters in question were subject to common management, his delegation did not believe it necessary to modify a terminology which had become traditional; the commentary to article 2 was not entirely clear regarding that question, however.

3. His delegation had no fundamental objections to part II, except for article 5; paragraph 2 might not be necessary since the concept of participation seemed non-essential and could give rise to difficulties or misinterpretations. Article 6 might also be unnecessary, since the list of examples of "relevant factors and circumstances" seemed superfluous.

4. His delegation continued to believe that the provisions in part III were far more detailed and constraining than was necessary in a framework agreement. They established procedural rules that would better be left to the discretion of States when they negotiated watercourse agreements. Those rules would restrain the flexibility that States might find useful in their negotiations. It was to be hoped that on second reading the Commission would simplify that part of the draft.

5. His delegation had no substantial problems with part V but felt that it could be made more precise through careful redrafting.

6. The first three articles of part VI could be moved into a separate part since they were all related. His delegation had no difficulty with articles 30

(Mr. Calero Rodrigues, Brazil)

and 31 but had serious doubts about article 32. The article referred to harm suffered in general as a result of activities related to an international watercourse instead of dealing only with harm suffered in another State. There seemed to be no valid reason to state the principle of discrimination in such general terms; the question of non-discrimination in access to judicial procedures had a cogency of its own and was not limited to cases involving international watercourses. At the same time, there was no mention whatsoever of the application of non-discrimination to harm suffered in another State. Moreover, the procedural right of access to judicial procedings was meaningless if no substantial right was recognized. Such a right to compensation or other remedies when the harm was suffered in another State would be essential if the principle of non-discrimination was to be effectively observed. Thus, harm caused in another State as a result of activities related to an international watercourse should be equated to a similar harm caused in a State where the activity was conducted, both in terms of substantive rights to compensation or other remedies, and in terms of procedural rights of access to courts.

7. Mr. MIKULKA (Czechoslovakia) noted that the question of the law of the non-navigational uses of international watercourses had first been taken up by the Commission in 1971. The question was characterized by the need for an interdisciplinary approach; legal considerations were largely determined by the physical nature of watercourses and the state of scientific knowledge in the field of hydrology. The problem of defining international watercourses lay in the need to establish a balance between the interdependence of riparian States and their sovereignty over natural resources and also between different uses of water. His delegation had always supported the idea of defining the term "international watercourse" so as to make it clear that it was a system consisting of hydrographical elements which, by virtue of their physical interdependence, constituted a unitary whole, some parts of which crossed State boundaries. However, on the question of whether the definition should include all elements of a hydrological system, including groundwater, he noted that the Special Rapporteur's preference for a broad definition were inspired by the appeals of various scientific bodies and expert meetings for a systematic approach to water management in view of the interdependence and diversity of the elements of the hydrological cycle. The draft articles submitted by the Commission could be applied both to surface water and to groundwater.

8. His delegation welcomed the reintroduction into the definition of the term "watercourse" of the concept "common terminus"; without that term the definition could artificially treat two or more natural watercourse systems flowing into different seas as a single watercourse because they were linked by canals.

9. The Commission had devoted scant attention to the need to define "non-navigational uses"; it was necessary to define what was meant, not by "non-navigational", but by "uses" of a watercourse, or of water itself, and to make a clear distinction between water use activities, which were covered by

(Mr. Mikulka, Czechoslovakia)

the draft articles, and activities on land, which were not. The Special Rapporteur, in paragraph 59 of his seventh report (A/CN.4/436), noted that it was almost impossible to exclude totally actions on land from the scope of the draft. However, the title of the draft articles referred to "uses of watercourses" while the example mentioned in footnote 112 to the seventh report of a plant discharging toxic waste was a question of the protection and conservation of watercourses, which was beyond the Commission's mandate. In order to avoid an ever broader interpretation, article 2 should be supplemented by a general definition of "uses" of international watercourses; it would otherwise be difficult to exclude other land-based or even atmospheric activities such as massive air pollution.

10. The formulation of a general definition of the term "non-navigational uses of international watercourses" could also help to reduce the problems in defining the term "international watercourse". The Commission had not sufficiently taken into account the entirely legitimate concerns of States which feared that the broad concept of "water systems" in the definition of the term "watercourse" might constitute a massive and unjustified interference in the territorial sovereignty of the State. Although it had been impossible to define the term "international watercourse" so as to balance a global and comprehensive approach to water use with the protection of the legitimate interests of territorial sovereignty, a definition of the term "uses" could help to achieve that balance.

11. When considering concrete obligations, it could be seen that the differences between the two schools of thought - one emphasizing State sovereignty over natural resources and the other the desirability of global water resources management - were not irreconcilable and that both concepts could usefully contribute to the formulation of substantive rules. That was the case with article 10; taking paragraph 1 of that article in the light of article 3, paragraph 1, his delegation would have no difficulty in approving article 10. However, the agreements envisaged in article 3, whether they concerned an entire watercourse, any part thereof or a particular project or programme, should not substantially impede the use of a watercourse by one or more other States.

12. Since the draft articles were a draft framework agreement, his delegation could also support articles 26 to 33.

13. His delegation wished to stress the importance of the principle of equitable and reasonable utilization, in the context of the obligations of States, along with the principle of cooperation. That concept determined the obligations of States and provided a framework within which the rights and duties of States could be logically ordered. The finalization of the draft articles would receive fresh impetus from the results of the United Nations Conference on Environment and Development and the draft articles would undoubtedly be a valuable contribution to the work of Working Group II of that Conference.

14. Mr. SCHARIOTH (Germany) said that, in view of the increased use of watercourses and growing concern about environmental damage, he welcomed the Commission's draft articles on the non-navigational uses of international watercourses.

15. The principle of equitable and reasonable utilization laid down in articles 5 and 6 was an important preventive measure in that it provided a basis for the settlement of conflicts concerning the use of international watercourses. Although article 6 contained a partial list of factors to be taken into account, both draft articles remained flexible enough to ensure that particular interests could be weighed in individual cases, so that a negotiated settlement acceptable to all watercourse States could be reached.

16. He also welcomed the Commission's focus on the establishment of procedural rules, as exemplified in articles 11, 13 and 19. That approach reflected a concern for the prevention of harm, rather than compensation for harm already caused.

17. Since the problem of water pollution required a comprehensive approach to the protection of watercourses, he supported the inclusion of groundwater in the definition of the term "watercourse". However, since the problems and principles that applied to "free" groundwater also applied to "confined" groundwater, the latter should be included in the definition to avoid the necessity of drafting a separate convention on "confined" international groundwater. He would welcome the views of other States on that question.

18. The term "appreciable harm" was also problematic, since the word "appreciable" could mean either "detectable" or "significant". He therefore proposed that the term "substantial harm" should be substituted. Furthermore, the difficult problem of responsibility for harm was not adequately reflected, since harm could result from an insignificant action by one State which merely compounded the effects of existing harmful uses in another. He reiterated his delegation's suggestion that paragraph 5 of the commentary on the term "appreciable harm" contained in the Commission's 1988 report (A/43/10) should be reflected in the draft article.

19. Mr. SIDDIQUI (Bangladesh) said that his country attached special importance to the non-navigational uses of international watercourses, since its largely agricultural economy was critically dependent on water resources from its rivers, most of which were international watercourses. Moreover, as a lower riparian country, Bangla`esh was at a comparative disadvantage.

20. Despite the vital interdependence of riparian States, only one third of all international river basins were the subject of agreements between such States. Where no such agreements existed, problems concerning the sharing of water resources had remained a constant source of tension and even of serious conflict. A universal legal framework on the subject was therefore essential to international peace and security.

(Mr. Siddiqui, Bangladesh)

21. With respect to article 2, the definition of a watercourse derived essentially from the unity of the hydrological cycle. Thus, the international character of a watercourse must be determined by both its geographical extent and the requirements of the riparian States.

22. Implementation of the principle of equitable and reasonable utilization, set forth in article 5, required close cooperation between upper and lower riparian States. In that connection, he strongly supported the inclusion of environmental and demographic considerations and of the vital needs of riparian States among the factors relevant to equitable and reasonable utilization set forth in article 6.

23. It followed from the principle of equitable utilization that States should be prohibited not only from causing appreciable harm to other riparian States in their use of an international watercourse, but also from engaging in any such use that could have adverse effects on other States. Article 7 should therefore include criteria for determining appreciable harm and adverse effects on riparian States. For example, the site at which a watercourse was used significantly influenced the effects of such use. The liability of States which caused such harm, as well as their compensation obligations, should also be made clear.

24. With respect to article 21, riparian States should have the right to receive information on any activities of other riparian States which could affect water quality in an international watercourse. An international mechanism should be developed to monitor the pollution level of international watercourses and to suggest remedial measures to the riparian States concerned. To protect and preserve ecosystems, not only contamination but also the drying up or diversion of international watercourses should be strictly prohibited. His delegation proposed that the draft articles should stipulate that upper riparian States did not have the right to divert the natural flow of an international river through unilateral action; were obliged to refrain from implementing any projects that could cause alterations in the existing water system without the consent of lower riparian States; and should respect the existing or traditional water uses of lower riparian States. A provision concerning the breach of those obligations should also be included.

25. Mr. ROUCOUNAS (Greece) said that the draft articles on the non-navigational uses of international watercourses were based on a few fundamental principles: that an international watercourse was a set of interconnected elements in which any modification of one element necessarily affected the others; that the utilization of international watercourses and participation in their benefits must be equitable and reasonable; that such utilization and participation entailed an obligation not to cause appreciable harm; and that effective mechanisms for cooperation among the States concerned should be instituted.

26. Since the principle of equitable and reasonable utilization should not be left in the abstract, he welcomed the enumeration, in article 6, of factors to

(Mr. Roucounas, Greece)

be considered. Article 7, despite its brevity, set up a legal framework for regulations which had proved effective in practice. The general obligation to cooperate, set forth in article 8, was described in detail in part III of the draft articles, while part IV focused specifically on the protection and preservation of ecosystems and the prevention, reduction and control of pollution.

27. Among the most important developments at the Commission's forty-third session had been the decision to include groundwater, which constituted 97 per cent of fresh water on Earth, within the scope of the draft articles, at least in the case of "free" groundwater. He supported such a hydrologically realistic approach, and also endorsed the inclusion of the word "system" in article 2 (b). With respect to article 10, which dealt with the difficult problem of the relationship between uses, he felt that the "vital human needs" referred to in paragraph 2 should be given a broad interpretation that went beyond the provision of water for drinking or for food production.

28. Articles 26, 27 and 28 offered international watercourse States a variety of mechanisms for cooperation. Article 32 gave the internal law of States direct responsibility for ensuring non-discrimination; more detailed provisions on that point would be necessary.

29. He reiterated his delegation's preference that the draft articles should be complemented by model rules for the settlement of disputes concerning the non-navigational uses of international watercourses.

30. Mr. BOS (Netherlands) said that although the Commission's efforts were laudable, it had taken too long to reach the current stage in the elaboration of the draft articles on the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. Since it could be assumed that the Commission was requested to study a given topic because the codification and development of the relevant rules were thought to be useful, the Commission should arrange to conclude its work on each topic within a fixed period of time, such as five years, while allowing for swifter responses to more urgent matters.

31. Notwithstanding the title of the draft articles, the navigational uses of international watercourses were rightly included within their scope by virtue of article 1, paragraph 2. The definition of an international watercourse was satisfactory in its breadth of application. Although the Commission had taken a realistic approach by requiring only that watercourse States should consult with each other on the uses of international watercourses, an obligation for such States to enter into formal agreements might have been preferable.

32. The relationship between equitable and reasonable utilization and participation (art. 5) and the obligation not to cause appreciable harm (art. 7) was problematic. In the case of uses not involving pollution, the obligation not to cause appreciable harm should be subject to the principle of equitable utilization. However, he welcomed the strict provisions in

(Mr. Bos, Netherlands)

article 21 on the prevention, reduction and control of pollution. Although he endorsed article 8 on the general obligation to cooperate, it should be borne in mind that such an obligation could, in some cases, preclude the optimal utilization of an international watercourse.

33. Part III of the draft articles, concerning planned measures, appeared to provide for equitable treatment of all States using an international watercourse. However, the notification provisions did not require the notifying State to undertake an environmental impact assessment, in which the notified State could participate, before a final decision on the implementation of planned measures was taken. That requirement was included in the Convention on Environmental Impact Assessment in a Transboundary Context, concluded in Espoo, Finland in Februrary 1991.

34. The Commission's draft was also somewhat weaker than the Espoo Convention in respect of the rights accorded to the public. Unlike article 32 of the draft before the Committee, the Espoo Convention not only prohibited discrimination between the public in the State of origin and in the affected State but also required the State of origin to ensure that the public in the affected State could participate in the environmental impact assessment procedure. It also made it obligatory for the State of origin to provide the public of the affected State with possibilities for making comments on, or objections to, the planned measures, as well as with the necessary environmental impact assessment documentation. However, the position of a State not notified in accordance with draft article 12 seemed stronger than that of the potentially affected State which had received no notification under the Espoo Convention. Referring to article 18, paragraph 2, of the draft, he said that the consultations and negotiations in question would presumably not be restricted to the question as to whether notification was required but would also deal with the planned measures' compatibility with the principle of equitable and reasonable utilization set forth in article 5 and the prohibition on causing appreciable harm set forth in article 7.

35. He noted with satisfaction that the provisions on planned measures (part III of the draft) were purely procedural in nature and did not affect the substantive legal position, even in cases where the notified State failed to react to the notification of the notifying State within the prescribed period of time (art. 16). In that connection, he remarked that the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law appeared, in his sixth report (A/C.4/428 and Add.1), to adopt a different approach.

36. The articles on protection and preservation (part IV of the draft) were generally satisfactory. It would be noted that article 20 on protection and preservation of ecosystems was particularly stringent in that it made no mention of possible appreciable harm to other watercourse States. A question which might arise in that connection was how that article related to articles 21 and 22, both of which were phrased in less stringent terms.

(Mr. Bos, Netherlands)

Problems might also arise with regard to the proper relationship between the provision on water pollution in article 21 and that in article 24, which obliged watercourse States to take measures to prevent or mitigate conditions that might be harmful to other watercourse States, whether resulting from natural causes or human conduct. Articles 25, 27 and 28 appeared to strike a reasonable balance between the interests of upstream and downstream watercourse States and could be regarded as satisfactory. The draft articles were, however, rather weak on the subject of institutional arrangements for permanent or regular cooperation between watercourse States. Such arrangements were not mentioned at all in articles 3 and 4 on watercourse agreements but only in article 26 on management, where the establishment of a joint management mechanism was not made obligatory.

37. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he said that, in view of the importance of the topic and the number of difficult legal issues involved, the Netherlands Minister for Foreign Affairs had in May 1991 requested the Netherlands Advisory Committee on Questions of International Law to draw up a report on the draft Code. An interim report had been issued early in October, and he was therefore in a position to present some preliminary observations. With regard to the scope of the draft Code, he took the view that too many crimes had been included. A clear link should exist between the types of crimes eligible for inclusion in the Code and the system of international enforcement envisaged. The crimes to be included in the Code therefore had to meet certain requirements. An international enforcement system should not be sought automatically whenever national enforcement problems arose or were likely to arise. The following criteria could be employed in selecting crimes eligible for inclusion in the draft Code: first, only those crimes which conflicted with fundamental humanitarian principles - with the "conscience of mankind" - should be included; second, only those crimes which, by their very nature, virtually precluded national enforcement should be eligible; and, third, the Code should only include crimes which related to acts perpetrated by individuals in their official capacity and which, at the same time, constituted a violation of a State's international obligations. On the basis of those criteria, only crimes of aggression, genocide, systematic or mass violation of human rights and exceptionally serious war crimes were eligible for inclusion in the Code.

38. With regard to the legal character of the draft Code, a close relationship between the envisaged system of international enforcement and the crimes to be included in the Code was again of the utmost importance. In that connection, he took the view that a convention should be drafted instead of a code, irrespective of whether the crimes and the enforcement machinery were to be covered by only one instrument or by two separate ones.

39. With regard to enforcement machinery, he wished to confine himself to the general comment that the procedure to be applied by an international criminal court, the penalties to be imposed and their enforcement should be in conformity with relevant universal and regional human rights instruments. The question of appropriate punishment for the crimes in question was a most

(Mr. Bos, Netherlands)

delicate one, as was that of the relationship between national and international enforcement systems. A choice had to be made between concurrent jurisdiction or application of the principle of subsidiarity; in the latter case, the question of whether the national or the international system should have priority remained to be settled. In conclusion, he suggested that, at least so far as some of the crimes in the Code were concerned, the Security Council might play a role; once again, such a role would have major consequences for the international enforcement system.

40. Mr. GODET (Observer for Switzerland), speaking on the law of the non-navigational uses of international watercourses, recalled the statements made by his delegation on that topic at the forty-third and forty-fifth sessions (A/C.6/43/SR.28 and A/C.6/45/SR.25). His delegation continued to feel that the Commission's draft should have been more explicit on the question of the status of a framework agreement vis-à-vis any specific agreements that might be concluded between watercourse States. So far as the draft's general acceptability was concerned, he noted that although in certain respects, particularly with regard to procedural rules, the draft went beyond existing rules of customary law, in most other respects it represented a codification of existing rules.

41. Referring to the definition of an international watercourse supplied in article 2, he noted that the concept adopted by the Commission was a relatively broad one, including groundwater and canals. While such a definition was no doubt justified from the scientific point of view, its acceptance by all watercourse States, especially upstream States, was by no means assured. With reference to the question of balance between the interests of upstream and downstream States, he recalled that in its statement at the forty-third session his delegation had pointed out that any watercourse State could effectively veto any new use of the watercourse by claiming that such use entailed a risk of appreciable harm. His delegation strongly supported the principle of equitable and reasonable utilization of the watercourse set forth in article 5 and felt that the draft should be more explicit on the subject of its implementation.

42. Article 7 on the obligation not to cause appreciable harm also gave rise to difficulties. By employing the term "appreciable" the Commission probably intended to convey that minor harm was excluded from the scope of the article. As he had pointed out on previous occasions, and as the representative of Germany had done earlier in the meeting, the term "appreciable" was open to misinterpretation and should be replaced by a more precise one throughout the draft. On the more fundamental issue of whether the obligation not to cause appreciable harm should or should not take precedence over the principle of equitable utilization, he thought that the Commission's approach was somewhat contradictory and, moreover, failed to take account of historical developments; the principle of equitable utilization should not be subordinated to the prohibition on causing appreciable harm because it had originally been introduced in order to modify that prohibition. The draft as it stood appeared to be more favourable to existing

(Mr. Godet, Observer, Switzerland)

utilizations of international watercourses than to possible new ones. It might be advisable to reverse that order of priorities by reverting to the approach advocated by the International Law Association in 1966.

43. Another imbalance between the relative positions of upstream and downstream States was apparent in article 21, paragraph 2, of the draft which, in effect, extended the scope of article 7 to the sphere of environmental protection. Clearly, upstream States would be the most severely affected by the introduction of such a rule.

44. In conclusion, after referring to more detailed comments included in the text of his statement circulated unofficially to members of the Committee, he stressed the usefulness of the work accomplished by the Commission in a difficult area of international law and expressed his delegation's view that, with a few adjustments, the text provisionally adopted by the Commission would provide an excellent basis for future negotiations.

AGENDA ITEM 125: MEASURES TO PREVENT INTERNATIONAL TERRORISM WHICH ENDANGERS OR TAKES INNOCENT HUMAN LIVES OR JEOPARDIZES FUNDAMENTAL FREEDOMS AND STUDY OF THE UNDERLYING CAUSES OF THOSE FORMS OF TERRORISM AND ACTS OF VIOLENCE WHICH LIE IN MISERY, FRUSTRATION, GRIEVANCE AND DESPAIR AND WHICH CAUSE SOME PEOPLE TO SACRIFICE HUMAN LIVES, INCLUDING THEIR OWN, IN AN ATTEMPT TO EFFECT RADICAL CHANGES (continued) (A/C.6/46/L.4)

(a) REPORT OF THE SECRETARY-GENERAL

(b) CONVENING, UNDER THE AUSPICES OF THE UNITED NATIONS, OF AN INTERNATIONAL CONFERENCE TO DEFINE TERRORISM AND TO DIFFERENTIATE IT FROM THE STRUGGLE OF PEOPLES FOR NATIONAL LIBERATION

45. The CHAIRMAN invited the Committee to take action on the draft resolution entitled "Measures to eliminate international terrorism" contained in document A/C.6/46/L.4.

46. Mr. NATHAN (Israel), speaking in explanation of position before the Committee proceeded to take a decision on the draft resolution, said that his delegation had joined the consensus on the draft because it considered that concentrating on the measures to eliminate international terrorism was the right approach towards combating that crime. In respect of paragraph 15, his delegation wished to reiterate its position according to which it condemned as criminal and unjustifiable all acts, methods and practices of terrorism, wherever and by whomever committed without any exception whatsoever, irrespective of the motives and purposes for which such acts might purport to be committed.

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Committee wished to adopt draft resolution A/C.6/46/L.4 without a vote.

48. It was so decided.

UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
27th meeting
held on
Friday, 1 November 1991
at 10 a.m.
New York

SUMMARY RECORD OF THE 27th MEETING

Chairman:	Mr. AFONSO	(Mozambique)
later:	Mr. SANDOVAL (Vice-Chairman)	(Ecuador)
later:	Mr. AFONSO (Chairman)	(Mozambique)

CONTENTS

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued)

This record is subject to correction.
Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, Room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

Distr. GENERAL
A/C.6/46/SR.27
18 November 1991
ENGLISH
ORIGINAL: SPANISH

91-57019 5221S (E)

The meeting was called to order at 10.05 a.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10 and 405)

1. Mr. RIVAS-POSADA (Colombia) said that his Government's position on the main elements of the issue of the uses of international watercourses was based on the principle of the right of the State of origin to use and exploit its natural resources. That right, which derived from the legal and political sovereignty of the State, must be exercised, in a spirit of international solidarity an cooperation, in such a way as not to cause appreciable harm to other watercourse States. Consequently, his delegation welcomed the fact that the principle of equitable and reasonable utilization and participation had been adopted as a guiding principle from which the rules in the draft articles were derived.

2. One of the areas which called for the broadest spirit of cooperation among the States concerned was that of the obligation of States to protect and preserve ecosystems and to implement planned measures. The principles set forth in the draft articles provided a general framework and some useful guidelines to govern the actions of States; nevertheless, only firm determination to set those actions on a foundation of solidarity and just and equitable collaboration could yield positive results. It should be remembered that the proposed rules were of a supplementary nature, which meant that watercourse States enjoyed unlimited rights with regard to defining the nature of any watercourse agreement into which they might enter, in the spirit which had informed the elaboration of the draft articles.

3. His delegation continued to believe that the use of the word "appreciable" in draft article 7 was not sufficiently precise for such a critical matter, which had an enormous bearing on relations between States. The word failed to indicate the gravity or seriousness of the harm, which represented a basic aspect of the topic. He suggested, therefore, the possibility of using an expression such as "substantial" or "significant harm".

4. He stressed the potential significance for relations between States of the issue of "confined" groundwater when the aquifer in which it was contained was intersected by a boundary. Nevertheless, his delegation agreed that confined groundwater should not be covered by the term "watercourse" and should accordingly not be included in the scope of the draft articles; at the same time, there was no question that the concept was relevant to the general settlement at some later time of issues relating to international waters.

5. In respect of the topic of jurisdictional immunities of States and their property, he wished to highlight the efforts of the International Law Commission to seek a compromise between those members advocating the doctrine of absolute State immunity and those favouring a restrictive concept of

(Mr. Rivas-Posada, Colombia)

immunity. Instead of attempting to solve a politically unsolvable theoretical problem, the Commission had wisely decided to limit itself to identifying those activities with regard to which a State could not invoke jurisdictional immunity. It was the view of his delegation that the proposed formulation was acceptable in general terms.

6. With regard to determining whether a transaction was commercial in nature, he noted that the Commission had had to settle the differences of opinion between those members who advocated examining the nature of the transaction in order to determine whether it was commercial or not and those members who believed that the purpose of the contract or transaction should serve as the main criterion in determining whether it was commercial in character. In view of the difficulty of omitting entirely the criterion of purpose, which continued to prevail in many national legislations, his delegation found acceptable the solution proposed by the Commisison, whereby the criterion of the nature of the transaction would first be applied and it would then be left open to the State concerned to contest the apparent commercial nature of the transaction if, in the practice of that State, the purpose of that transaction was relevant to determining its character.

7. In respect of the proposal to convene a conference of plenipotentiaries to consider the draft articles and conclude a convention on the topic, his delegation believed that it was first necessary to surmount the difficulties that remained with regard to several of the draft articles; that task should be undertaken by a working group of the Sixth Committee. As to the view that the differences of opinion, among Commission members were slight and not significant enough to delay the convening of the conference, it was precisely for that reason that a final effort was justified so that there would be no risk of reopening a debate which might block a final agreement.

8. He applauded the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind and emphasized the importance of article 25, dealing with illicit traffic in narcotic drugs. His country, which had in recent years been suffering from that contemporary blight which was affecting the entire world, had been stressing that matter in every international forum so that it would be dealt with in the manner in which it had finally been treated in the draft articles. The draft articles should be given further consideration in order to incorporate in them the necessary modifications and precisions; however, it should be acknowledged as of now that the Commission had taken a major step forward in dealing with a topic of great significance.

9. Referring to the list of topics for consideration submitted by the Commission, he said that his delegation agreed that it was important to give priority to those topics on which a substantial amount of work remained to be done. In addition, it was obvious that some of the topics on the list did not fall within the purview of the Commission but rather of other bodies in the system. Other topics did not really lend themselves to codification, and there were yet others whose relative importance did not justify their

(Mr. Rivas-Posada, Colombia)

immediate inclusion in the Commission's programme of work. Just two or three new topics should be selected, on a provisional basis. Those topics might include: the law concerning international migrations; the law of confined international ground waters, a topic which would serve as a supplement to the draft articles on international watercourses; and international commissions of fact-finding, a matter on which the Sixth Committee had had the chance to hear views when it had considered the report of the Special Committee on the Charter.

10. Mr. GRÖNBERG (Finland), speaking on behalf of the Nordic countries, said that in accordance with established procedure they would submit written comments on the draft articles, so that he would confine himself to underscoring the special interest they had in the non-navigational uses of international watercourses, given the fact that General Assembly resolution 2669 (XXV) recommending that the Commission should take up a study of the topic had resulted from a Nordic initiative.

11. Although the Commission had been criticized because of its slow progress in completing its assigned task, that was to a large extent due to its extensive programme of work and the fact that a number of significant issues had to be considered simultaneously in the course of relatively short yearly sessions.

12. He believed that after the comments and observations made by Member States on the draft articles were analysed, a second reading would follow in a not too distant future. The results of the first reading were promising.

13. Mr. Sandoval (Ecuador), Vice-Chairman, took the Chair.

14. Mr. YAMADA (Japan) underscored the growing practical importance of the law of international watercourses in terms of protection of ecological systems and preservation of the environment. Hence the significance of the work of the Commission, which was aiming to produce a general convention that would provide the basic framework for dealing with the topic and would regulate the various uses of international watercourses. He expected that the Commission would continue trying to establish a framework of international cooperation in that area.

15. Regarding the definition of the term "watercourses", the approach to a watercourse as a system of waters composed of hydrographic components constituting by virtue of their physical relationship a unitary whole was interesting, and his delegation supported it. It also welcomed the detailed consideration given to the question of groundwater, and the Special Rapporteur's report had convinced it that the physical relationship should not be ignored in the deliberations on the topic. On the other hand, when groundwater was included as a component of a system of waters, it was necessary to bear in mind that there would be situations where the physical relationship between a groundwater source and an international watercourse

(Mr. Yamada, Japan)

might be difficult to determine, and others where it would be very difficult to prove scientifically in what form and under which countries groundwater existed. Therefore, owing to the dearth of scientific data and studies on the subject, it was possible that the question of groundwater might present insurmountable difficulties. In proceeding with codification in that area, a consideration of the physical relationship had to be combined with an approach aimed at establishing rights and duties with regard to a core issue by providing a single, clear definition of that issue.

16. In view of the increasing importance of the use, management and protection of watercourses, it was hoped that a convention would be drafted establishing a broad international framework of cooperation, thus providing an incentive for concluding individual agreements on specific matters.

17. Mr. BOWETT (United Kingdom) said that the Commission's work on the non-navigational uses of international watercourses was a valuable contribution to the international protection of the environment. His delegation was in general content with the direction in which the work was progressing and had noted many improvements in the draft articles, particularly the revisions of article 29 on international watercourses and installations in time of armed conflict.

18. The decision to include groundwater within the definition of an international watercourse struck his delegation as both imaginative and sensible. In many areas of the world the substantial water resources were groundwater, which provided the main source of drinking water. However, the Commission was planning a set of articles to be embodied, in due course, in a framework agreement, which would impose obligations on the ratifying States. It most probably would be supplemented by specific agreements dealing with particular watercourses, whose provisions would prevail. But the question was whether a State, at the time when it accepted the framework agreement, would know precisely what obligations it was undertaking.

19. In the case of surface water, its location and extent was more or less readily apparent, so that a State could identify the scope of its obligations. With underground water, the location and size of the resource or its interaction with the watercourses of other States, might not be known. While such questions could, with time, money and expertise, be investigated, States - and in particular developing States - might have other, prior calls on their resources. Thus, there remained the question whether States would be prepared to bind themselves to a framework agreement before they knew exactly what they were undertaking.

20. One solution would be to aim for a set of model rules rather than a framework agreement. States would then embody those rules, as necessary, in a specific agreement relating to an identified watercourse and, presumably, any necessary scientific studies as to the extent of the watercourse would be carried out before a State subscribed to it. A framework agreement would, in

(Mr. Bowett, United Kingdom)

principle, apply to all international watercourses throughout the territory of a State, and it would be a very different matter, and possibly unrealistic, to expect to have knowledge of all such watercourses and of the full extent of the obligations resulting from such an agreement.

21. He endorsed the importance attached by the Commission and the Special Rapporteur to ensuring that the draft articles and the terms used were soundly based on scientific reality, and appreciated the care they had taken to present the relevant data. His Government would carefully study the matter in order to prepare comments and suggestions within the timetable requested by the Commission.

22. Mr. VASYLENKO (Ukraine) observed that the Commission had concluded its study of the item on jurisdictional immunities of States and their property by approving the final version of the corresponding draft articles. That opened up the possibility of adopting a convention on the topic that would help develop international economic relations and protect the economic interests of States. The Commission had also provisionally adopted the draft articles on the law of the non-navigational uses of international watercourses, which was highly important for the equitable regulation of that area of international relations and for the maintenance of good-neighbourly relations between States. The Commission had, further, continued its study of the second part of the item on relations between States and international organizations. The Commission had made modest but meaningful progress in its efforts to establish a solid legal basis for cooperation through international organizations of a universal character.

23. Unfortunately, very little progress had been made on the topic entitled "State responsibility". He hoped that everything possible would be done to speed up the debate on that topic, not only because it was relevant to the maintenance of international peace and order but also because the Commission was about to conclude its work on the draft Code of Crimes against the Peace and Security of Mankind, which was closely related to the question of State responsibility. The conclusion of work on those two topics should be synchronized so that an agreement in principle could be reached on both drafts. In most cases, crimes against the peace and security of mankind entailed State responsibility, since such crimes were committed by individuals in the service of States.

24. The draft Code of Crimes against the Peace and Security of Mankind could serve as a basis for a debate at an international conference of plenipotentiaries. Moreover, there seemed to be no justification for setting 1 January 1993 as the deadline for Member States to submit comments and observations on the draft articles. That time-limit could be shortened by at least six months.

25. A few provisions of the draft articles, particularly those contained in Part II of the draft Code entitled "Crimes against the peace and security of

(Mr. Vasylenko, Ukraine)

mankind", might require further clarification. The draft Code should not deal with any individual but only to civil servants or persons acting as agents of the State.

26. There was no need to establish a standing international criminal court since international criminal courts could be established though agreements among interested States whenever it was necessary to consider specific situations. To that end, the Commission could prepare rules for the establishment and functioning of such special courts, which would be annexed to the Code.

27. The Commission was currently examining Part Two of the draft articles on State responsibility, which concerned the content, forms and degrees of international responsibility. In order to ensure progress on Part Two, which was the most important part, a clear distinction must be made between responsibility and sanctions and between the various forms of responsibility and sanctions, bearing in mind that the State that had committed the internationally wrongful act always bore responsibility and that the injured State had the right to take countermeasures. Responsibility entailed not only reprisals as a means of re-establishing the status quo ante but also compensation and reparation. A distinction should therefore be made between compensation and reparation for an internationally wrongful act, on the one hand, and compensation and reparation for other violations of the provisions of the Code, on the other.

28. The draft articles on State responsibility should include criteria for determining the extent of the injury to a State and assessing the responsibility of the State that had committed the internationally wrongful act. The determination of the extent of the injury should be useful in assessing responsibility. The draft articles should also contain a third part devoted to the settlement of disputes and methods of invoking international responsibility.

29. To that end, an optional protocol should be prepared on the compulsory jurisdiction of the International Court of Justice with respect to disputes arising from internationally wrongful acts.

30. His delegation was pleased that the Commission was continuing its work on the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", which would provide a solid legal base for compensating anyone who suffered such injurious consequences. The Commission's completion of its work on the topic would contribute to the stability of the international legal system, which was essential for dealing with the serious problems facing mankind.

31. Mr. OSHODI (Nigeria) said that, since its establishment, the International Law Commission had justified the confidence placed in it, since it encouraged the progressive development of international law and its

(Mr. Oshodi, Nigeria)

codification through studies and useful and coherent recommendations. Moreover, by encouraging the developing countries to appreciate and understand the rules of international law, the Commission was carrying out important work that gave rise to hope for a better future.

32. The Commission had concluded its consideration of the topic entitled "Jurisdictional immunities of States and their property" and had adopted the final text of the draft articles. A convention on the subject would be of particular importance to weaker States whose sovereignty could be easily violated in spite of the rule of law. The scope of the draft articles was satisfactory and would help minimize friction between States. Commercial disputes between nationals of a foreign State acting in their private capacity and the State of the forum should not be used as a pretext to derogate from the sovereign right of the foreign State to claim immunity from jurisdiction.

33. The draft articles had extended the concept of "State" to cover a number of categories of constituent units of sovereign States. While that was a welcome development, the inclusion of the second category of constituent units of a federal State was rather intriguing. His delegation accepted the inclusion of that category in the context of acts performed by such constituent units in the exercise of the sovereign authority of the federal State. However, instances occurred where constituent units or "States" of a federation acted for themselves. A distinction should therefore be made between acts of a constituent State of a federation that involved a foreign State and acts that involved another constituent State within the same federation. It should be possible to plead immunity only in the first case since, in the second, the two States would be seen as parts of an integral sovereign State. That distinction would be in keeping with the commentary to article 1 contained in the report, which noted that the existence of a foreign State and a State of the forum, was a prerequisite to the question of jurisdictional immunities. That matter should be further examined from the point of view of State practice and the spirit of the draft articles with a view to laying the groundwork for uniformity in the interpretation of the proposed convention.

34. His delegation welcomed the inclusion of articles 5 to 9 in the draft articles. Those articles laid down the modalities for ensuring that the jurisdictional immunity of a sovereign State was not violated at random, but only with the consent, expressed or implied, of the State itself. The most important guarantee was the obligation imposed on the State of the forum to ensure that its courts determined that the immunity of the other State under article 5 was respected.

35. His delegation supported the Commission's recommendation regarding the convening of an international conference of plenipotentiaries, at which his delegation would comment in detail on all the draft articles.

(Mr. Oshodi, Nigeria)

36. With regard to chapter III of the report, it was gratifying that the Commission had been able to complete the first reading of articles designed to ensure cooperation among watercourse States in regulating the use of international rivers and watercourses. Nigeria was a member of several international river basin organizations which gave particular attention to the economic and environmental effects of the use of international watercourses; it would continue to contribute to the elaboration of an appropriate legal regime with a view to eliminating the causes of friction along such watercourses.

37. With regard to the draft Code of Crimes against the Peace and Security of Mankind (chap. IV), he said that, at its forty-third session, the Commission had endeavoured to rationalize the efforts which it had made over many years, but that the inherent difficulties of the item were still apparent. In his ninth report, the Special Rapporteur had indicated that, in international law, the diversity of concepts and philosophies was hardly conducive to a uniform system of punishment, whereas in domestic law there was in each State a certain unity of moral and philosophical concepts. That was a question which must be tackled and resolved if the principle nulla poena sine lege was to be adhered to.

38. Even in domestic law there were instances in which there was no such uniformity, instances which had created conflicts in society. If the draft Code of Crimes against the Peace and Security of Mankind was to be respected by all nations, there was a need to strike a balance among diverse concepts.

39. With regard to the proposal to establish a court to administer the Code, it should be possible to set up a body to exercise international criminal jurisdiction on the same basis on which the International Court of Justice and the Nürnberg Tribunal had been set up.

40. With regard to chapter V of the report, his delegation was of the view that the obligation to exercise one's rights without causing injury or loss to others applied not only to individuals but also to States, and that whoever violated the principle sic utere tuo ut alienum non laedas should make adequate reparations to the injured persons. Modern jurisprudence even supported the view that it was not only necessary to act with care but also to take the initiative to prevent any act likely to cause injury to others. For example, in the context of protecting the environment, attention should be given to those activities which were likely to cause transboundary harm and attempts should be made to prevent it. The issue was currently being examined in various international forums and the Nigerian delegation hoped that an acceptable solution to the various problems posed by the topic would eventually emerge.

(Mr. Oshodi, Nigeria)

41. His delegation also hoped that, with the passage of time, progress could be made in the work on the two remaining items in the Commission's report (chaps. VI and VII).

42. Mr. Afonso (Mozambique) resumed the Chair.

43. Mr. AL-BAHARNA (Bahrain) said his delegation welcomed the fact that the Commission had adopted on second reading a complete set of articles on the topic "Jurisdictional immunities of States and their property" (A/46/10, chap. II) and supported the Commission's recommendation to the General Assembly that it should convene an international conference of plenipotentiaries to conclude a convention on the subject (A/46/10, para. 10).

44. With the growth of international trade and participation in it by States and State commercial enterprises, the question of regulating jurisdictional immunities of States and their property had acquired prominence, as there was a need to unify and to harmonize the divergent practices of States in that area. Controversies must be settled - such as the conflict between the theories of absolute and limited State immunity - and the rules of international law concerning State immunity must be spelled out.

45. With regard to the draft articles, he noted that the controversy which had arisen during previous sessions of the Commission and of the Sixth Committee as to the test for determining whether a contract or transaction was a "commercial transaction" had been settled in article 2, paragraph 2, with the inclusion of the "purpose" test. The delegation of Bahrain supported both the inclusion of that test and the manner in which it was applied in the commentary on paragraph 2 (A/46/10, pp. 29-30, paras. (25) and (26)).

46. His delegation also strongly supported the basic criterion adopted by the Commission in draft article 5, namely, accepting the principle of immunity with certain specific exceptions. He recalled that the text of article 5 adopted on first reading had contained, in square brackets, the phrase "and to the relevant rules of general international law", apparently in order to stress that the draft articles were not intended to prevent the development of general international law. However, owing to the intense controversies aroused by the phrase, the Commission had agreed to delete it on second reading, believing that any immunity or exception to immunity accorded under draft article 5 would not prejudice the future development of State practice (A/46/10, p. 39, para. (3)). The delegation of Bahrain therefore supported the deletion of the phrase in question from the text of article 5.

47. His delegation also agreed with the position adopted in article 10, paragraph 3, concerning commercial transactions engaged in by State enterprises. He noted with satisfaction that former article 11 bis concerning "segregated property", about which his delegation had expressed reservations, had been deleted on second reading.

(Mr. Al-Baharna, Bahrain)

48. With regard to article 20 concerning service of process, he said that, at the forty-fifth session of the General Assembly, his delegation had proposed that a new clause should be added guaranteeing that service of process should be effected in accordance with the domestic law of the forum State; while that proposal had not been accepted, both the current text of article 20 and the commentary thereon in the Commission's report (A/46/10, p. 146, para. (1)) were satisfactory. In his view, the provision in article 20, paragraph 1 (b) (ii) constituted a sufficient guarantee of service.

49. With regard to article 21, he noted with appreciation the change made on second reading in paragraph 1 (b), extending the expiry period from three to four months from the date on which service was effected. However, he was of the view that that period would not be sufficient to protect the interests of some of the developing countries, especially the least developed countries, and suggested that it should be extended to six months. For the same reason, he suggested that an identical amendment should be made to article 21, paragraph 3.

50. Mr. KOTLIAR (Secretary of the Committee) said that Rwanda and Cameroon had joined the sponsors of draft resolution A/C.6/46/L.6 concerning the progressive development of the principles and norms of international law relating to the new international economic order.

The meeting rose at 11.40 a.m.